Cassels

National Instrument 43-101: Commonly Overlooked Items When Preparing a Technical Report

Alexander Pizale, Gregory Hogan, Stefan Politano

July 30, 2024

Technical reports are a significant disclosure document for a mining issuer and a meaningful resource for investors. National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* (NI 43-101) provides a detailed framework for the preparation of a technical report. Given the complex subject matter, these reports can be both time-consuming and costly to prepare. Issuers dedicate (and should dedicate) substantial resources to ensure the compliance, utility and longevity of their technical reports. However, there are items that are often overlooked or not clearly understood within the required framework. The purpose of this article is to highlight such items for issuers and qualified person authors to take into consideration when preparing a technical report.

- **Address Material Forward-Looking Information** – Technical reports, by their nature, include possible events, conditions, production guidance and/or financial forecasts that are based on assumptions about future economic conditions and courses of action. Oftentimes, a discussion of the forward-looking information is absent from the report notwithstanding the companion policy reminders that must be addressed. Issuers should ensure that their technical report authors remember to comply with the requirements of Part 4A of National Instrument 51-102 – *Continuous Disclosure Obligations* (NI 51-102), including identifying the forward-looking information, stating material factors and assumptions used and providing the required cautionary language. Note that the exceptions in NI 51-102 that refer to disclosure required by NI 43-101 relate to additional requirements imposed on forward-looking information that is future oriented financial information and financial outlooks, such as limits on the period for which they can be provided. In addition to meeting the continuous disclosure rules, compliance also permits issuers to rely on the "safe harbor" from liability under securities laws related to forward-looking information.
- **Address Non-GAAP Disclosure** – Securities laws regulate how disclosure of non-GAAP measures may be made under National Instrument 52-112 – *Non-GAAP and Other Financial Measures Disclosure* (NI 52-112). Technical reports often include non-GAAP measures such as internal rate of return (IRR), net present value (NPV), all in sustaining costs (AISC), etc. Even though these measures are forward-looking, certain of these measures are not exempt from NI 52-112, which require reconciliations among other things. These rules can be quite nuanced, and compliance can lead to absurd results, but it is nevertheless required and important to ensure NI 52-112 is complied with to avoid later issues with regulators.
- **Include a Material Executive Summary** – It is important to ensure that an adequate amount of detail be included in the summary section of a technical report. Form 43-101F1 does not provide

detailed guidance on the contents of a summary. However, given the use of this summary in other continuous disclosure filings, issuers and technical report authors may take guidance from other rules. A recommended resource for the contents of a technical report executive summary is section 5.4 of Form 51-102F2 (being the mineral property disclosure required in an issuer's Annual Information Form (AIF)). Not only will this ensure the material items are captured in the summary section of the technical report, but it will also help an issuer with the preparation of the technical report summary for the AIF (as the report summary can largely be relied on in the AIF). Furthermore, in adopting this approach, the qualified person authors will have reviewed/approved the summary during the course of finalizing the technical report, resulting in a more efficient review and consent process at the time of AIF or prospectus filing.

- **Mind Your Reliance/Disclaimers** – NI 43-101 *ONLY* permits limited disclaimers with respect to legal, political, environmental or tax matters relevant to the technical report. A key pillar of NI 43-101 is that the qualified person is responsible for preparing the technical report. Often reports contain inappropriate disclaimers of responsibility such that qualified person authors will add limiting statements in the technical reports renouncing their responsibility in respect of other matters that are not within the limited exception above. In addition, disclaimers often refer to contracts with the issuer. The qualified person author must certify that the report contains all scientific and technical information required in order to make the report not misleading and that it has been prepared in accordance with NI 43-101. It is therefore important to review all disclaimers and remove any inappropriate blanket disclaimers of responsibility.
- **Name the Author Not the Consulting Firm** – In various sections of Form 43-101F1, there are requirements to state the interpretations, conclusions, review and opinions of the technical report authors. The report will often reference the authors' consulting firm rather than the author themselves. Regulators have provided comments on this to remind issuers and qualified person authors that such interpretations, conclusions, review and opinions are to be those of the authors and not of the consulting firm or company by which they are employed. Therefore, it is important to clearly set out which authors are making the interpretations, conclusions, review and opinions within each section of the technical report rather than referencing the consulting firm more broadly.
- **Remember the Site Visit** – COVID-19 raised many questions around site visits due to travel restrictions. There is no relief for the requirement of a site visit, except in very limited circumstances for early stage exploration properties. Therefore, the issuer must have at least one qualified person who is responsible for preparing or supervising the preparation of all or part of the technical report complete a current inspection on the property that is the subject of the technical report.
- **Assess the Expected Shelf Life** – Economic information in a technical report can become outdated. Issuers may be able to "extend" the life of a technical report by including well thought out sensitivity analyses of key economic variables that are tailored to address items that are likely to change. For example, in recent years due to inflation, CAPEX has been a concern for many issuers. As a result, this could be an important item to add to the sensitivity analysis and risks sections of the report. Other variables should be similarly assessed for susceptibility to variances. Otherwise, reference to outdated technical reports or economic projections without context and cautionary

language could result in misleading disclosure and trigger the need for a new current technical report.

- **Include Specific Risks and Uncertainties** – Technical reports often contain very generic risks that are not tailored to the issuer and the project. Item 25 of Form 43-101F1 requires a summary of the relevant results and interpretations of the information and analysis being reported on. Regulators have flagged inadequate disclosure of risks and uncertainties as a common deficiency in technical reports and have suggested that issuers consider including, in table-format, a matrix of the significant project-specific risks, potential outcomes and mitigating factors along with supplementary discussions.
- **Scrutinize Historical Estimates** – If historical estimates are included in a report, such estimates must comply with Section 2.4 of NI 43-101, including all the necessary cautionary language, including commenting on relevance and reliability and the work to make the estimate current. In addition, issuers need to be mindful that historical economic analyses are prohibited under NI 43-101 and any such disclosure can trigger the filing of a technical report in support of that economic information (i.e., to support this as a current economic analysis). Careful attention must be paid to reporting of any historical information to ensure a report is not inadvertently triggered.
- **Review the Certificates** – Once a report is completed, it is prudent to review and cross-reference the required certificates prior to filing in order to ensure that at least one qualified person author has taken responsibility for each section of the technical report, as required by NI 43-101.
- **Consider if an Independent Qualified Person is Required** – Most situations require that a technical report be prepared by an independent qualified person, however, there are exceptions. For instance, a producing issuer is exempt from the independence requirements and, in most cases, if a new report is being prepared that is not disclosing for the first time mineral resources, mineral reserves or the results of a preliminary economic assessment on a property material to the issuer, or a 100% or greater change in the total mineral resources or mineral reserves on such property, an issuer is allowed to file a non-independent technical report. Overall, there are nuances to the independence requirements, and NI 43-101 should be reviewed in each situation on a fact-specific basis to determine if an issuer is exempt from preparing an independent report.

Issuers are responsible for their disclosure, including what is in a technical report prepared by a third party, therefore, issuers must carefully review NI 43-101 and the related staff notices when they are preparing a technical report to avoid missing required disclosure or including prohibited disclosure. The failure to address these requirements before a report is completed and filed may result in a regulator's request to refile a report and advise investors to not rely on an existing report. We are always happy to assist an issuer with a review of their technical report from a legal compliance perspective to help avoid this outcome.

For more on NI 43-101, find our previous articles in this series here.

Cassels

Cassels has distinguished itself in the vanguard of the mining industry, offering the largest and most experienced dedicated mining group of any major Canadian law firm. Led by Jen Hansen *and* Jennifer Traub*, we are proud to be consistently ranked as Tier 1 for mining law by Chambers Canada. To learn more, visit* cassels.com/mining*.*
